UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

NEWMAN LIVESTOCK-11, INC.

and Case No. 32-CA-084178

RICARDO ASCENCIO, an Individual

and Case No. 32-CA-084180

EFRAIN ASENCIO LOZA, an Individual

and Case No. 32-CA-084191

JOSE MANUEL BRAMBILA, an Individual

Angela Hollowell-Fuentes, Esq., for the Acting General Counsel Esmeralda Zendejas, Esq., Migrant Worker Attorney California Legal Assistance, Inc., Stockton, CA., for Ricardo Ascencio and Effrain Ascencio Loza

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Oakland, California on September 3, 2013. The charge in Case No. 32-CA-084178 was filed by Ricardo Ascencio, an Individual, on June 27, 2012. The charge in Case No. 32-CA-084180 was filed by Efrain Ascencio Loza, an Individual, on June 27, 2012. The charge in Case No. 32-CA-084191 was filed by Jose Manuel Brambila, an Individual, on June 27, 2012. Thereafter, on June 20, 2013 the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by Newman Livestock-11, Inc. (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

The Respondent did not appear at the hearing. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing a brief has been received from Counsel for

the General Counsel (General Counsel), and the Respondent has submitted a letter dated October 23, 2013 with accompanying documents, and another letter dated November 12, 2013, in the nature of a reply brief. Upon the entire record, and based upon my observation of the witnesses and consideration of the brief and letters submitted, I make the following:

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Findings of Fact

I. Jurisdiction

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The Respondent in its answer to the complaint has contested jurisdiction.

The complaint alleges and the Respondent's answer does not deny that at all material times the Respondent has been a California Corporation with an office and place of business in Newman, California, and has been engaged in the slaughtering and processing of livestock. The record shows that the Respondent was no longer in business after May, 2012.

Manuel Brazil testified that he is president of Petaluma Livestock, a livestock auction engaged in the selling of livestock to customers inside and outside of the State of California. Asked approximately how much business Petaluma Livestock did with Bartell's Meat, located in the state of Oregon, from about mid-2011 to mid-2012, Brazil testified that "Without looking at my records, it could be anywhere from 100 to 150,000 during that period."

Brazil testified that the Respondent leased the Newman, California slaughterhouse from Petaluma Livestock beginning on October 11, 2011. Further, Brazil testified that from October 11, 2011 "until approximately I believe December, same year," less than a two or three month period, Petaluma did business with the Respondent in the amount of "Gee, without looking at my records, I would approximately (sic) on a weekly basis anywhere from 5,000 to 10,000 weekly." Moreover, at the time of the alleged unfair labor practices herein, infra, it is clear that the Respondent was not doing business with Petaluma Livestock.

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Brazil, who repeatedly said he did not look at his records, was not asked to produce any records to substantiate his approximations either with regard to dates or dollar volume of business with either Bartell's Meat or the Respondent.

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On the basis of the foregoing it is clear that the General Counsel has failed to definitively show that the volume of business exceeded \$50,000 during the short period Petaluma Livestock did business with the Respondent. While the General Counsel interprets Brazil's testimony to imply that the business relationship extended from October 11, 2011 through December 2011, this is not what Brazil testified. Rather, he testified that the business relationship lasted from October 11, 2011 "until approximately I believe December, same year." Accordingly, the business relationship, if it continued into December, could have ended December 1. Assuming the business relationship ended on December 1, this means there was less than a seven week business relationship between the two entities. Moreover, given Brazil's uncertainty and his speculation regard the weekly amount of business with the Respondent, there is no way to definitively ascertain from the record evidence whether during the indefinite period in question the total dollar volume of business exceeded \$50,000 and thereby met the Board's standard for asserting jurisdiction under its indirect outflow standard. *In re Towley Sweeping Service, Inc.*, 339 NLRB 301, 301 fn. 4 (2003;. *Siemons Mailing Service*, 122 NLRB 81 (1959)

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¹ Moreover, the alleged unfair labor practices occurred subsequent to the time Petaluma Livestock ceased doing business with the Respondent.

Accordingly, I shall dismiss the complaint on this basis.

II. Alleged Unfair Labor Practices

5 A. Issues

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The complaint alleges that the Respondent has violated section 8(a)(1) and (3) of the Act by discharging employees who concertedly refused to continue working for the Respondent until they were paid their back wages.

B. Facts and Analysis

Victor Vera testified that he began working for the Respondent in October, 2011 and stopped working for the Respondent at the beginning of January, 2012. He performed a variety of duties, including butchering duties. His supervisor was Linda Kanawyer, plant supervisor or manager. In early January, 2012 he and some 15 to 17 of his coworkers were not being paid on a regular basis. The discussed the matter among themselves and one day in early January they collectively decided to meet in the Respondent's parking lot and to refuse to work until they were paid their back wages. Kanawyer confronted them in the parking lot and, according to Vera, "she asked each one of us and say that if we didn't work, we were basically fired." She said, "You're 'F' fired basically." Vera had the keys to the plant and Kanawyer asked him for the keys. After they were fired they left the premises and have not returned to work. Contrary to contentions made by the Respondent in communications with the Regional Office, Vera testified that none of the employees were drinking alcohol either inside or outside the facility.

Employee Jose de Jesus Lopez testified similarly to Vera. Lopez further testified that approximately five or six or more employee returned to the facility the following day "just to claim our money." Hillel Shamam, the Respondent's owner, came out and talked to them and, according to Rodriguez, said, "when I have your money, I'll pay you and give you a call."

On the basis of the foregoing I find that the employees were discharged for concertedly refusing to work until they were paid the wages due them. Such conduct is violative of the Act. See *Ablon Poultry and Egg, Co.*, 134 NLRB 827, 829 (1961); *Toledo Commutator Co.*, 180 NLRB 973, 977 (1970). In the event the Board had jurisdiction over the Respondent, the violation would warrant the mailing of an appropriate notice, as the Respondent is no longer in business. It appears that backpay would not be due any employees subsequent to their terminations, as they had decided not to return to work until they were paid what was owed them, and there is no showing that they were paid what was owed them or requested reinstatement and were nevertheless refused reinstatement.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

It is recommended that the complaint be dismissed for lack of jurisdiction over the Respondent.

² While this scenario comports with the Respondent's apparent position that the employees were not discharged but simply refused to work until they were paid the wages due them, nevertheless the record evidence establishes, I find, that the employees were told they were fired.

On these findings of fact and conclusions of law, I issue the following recommended:

5 ORDER³

The complaint is dismissed in its entirety.

Dated, Washington, D.C., November 26, 2013.

Gerald A. Wacknov Administrative Law Judge

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³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.